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Michele Farquhar, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, DC 20554

Re: *Ex Parte* Filing
800 MHz SMR Licensing
PR Docket No. 93-144

Dear Ms. Farquhar:

The American Mobile Telecommunications Association, Inc. (AMTA), SMR WON, the Personal Communications Industry Association (PCIA) and Nextel Communications, Inc. (collectively, the "Parties"), pursuant to Section 1.1206(a)(1) of the Federal Communications Commission's ("FCC" or the "Commission") Rules, 47 C.F.R. § 1.1206(a)(1), submit this *ex parte* communication in the above-referenced proceeding. Two copies of this presentation are being filed simultaneously with the Office of the Secretary.

I. BACKGROUND

The Parties again urge the Bureau to adopt the 800 MHz industry consensus position in formulating new licensing rules for the "lower 230" channels of the 800 MHz SMR frequency band and resolving remaining issues concerning licensing of the upper 200 channels of the band. The consensus position was submitted to the Commission in Joint Reply Comments filed on March 1, 1996 by SMR WON, Nextel and AMTA. PCIA has filed comments advocating similar positions and has since endorsed the proposal. The consensus position, now nearly unanimously supported by the SMR industry, includes the following points:

- The Commission should adopt a pre-auction, channel-by-channel, Economic Area (EA)-by-EA settlement process for the lower 230 channels;

- Channels within each EA for which there is a successful settlement would be excluded from any further licensing process. Mutually exclusive applications for channels that do not settle should be resolved through the auction of five-channel, EA-based blocks in the lower 80 SMR channels and three 50-channel blocks in the 150 formerly General Category channels;

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- When coupled with the EA settlement process, there is consensus for designating one 50-channel block and the 80 SMR channels as an entrepreneurial set aside, while permitting any party to participate in the auction of the remaining two 50-channel General Category blocks.

- The Commission should encourage a cost-sharing/cooperative arrangement among the upper 200 channel auction winners during the process of retuning upper-channel incumbent systems;

- Baseline requirements for achieving "comparable facilities" in the retuning/relocation process should be based on the premise that the retuned/relocated system should "perform tomorrow at least as well as it did yesterday." Comparable facilities should include 1) the same number of 800 MHz channels, 2) retuning/relocation of the entire system, and 3) the same 40 dBu contour as the original system. The Parties define a "system" as a base station(s) and those mobiles that regularly operate on the station(s). A base station's location is determined by its authorized coordinates, regardless of the EA or EAs into which its signal penetrates. A multiple base station system could, therefore, include multiple EAs.

- There is industry support for the general concepts of the upper 200 channel auction and mandatory returning/relocation process ***if*** coupled with the industry's proposed lower-channel settlement process.

While additional details of proposed licensing rules have been discussed and submitted by individual parties since the consensus position was filed, the proposal's outline remains unchanged.

II. ADOPTION OF THE CONSENSUS PROPOSAL IS IN THE PUBLIC INTEREST.

A. The Consensus Position Will Result in a More Rapid End to the Retuning/Relocation Process.

As the Commission is well aware, licensees operating on the 851-866 MHz band, whether providing commercial service or operating a private, internal system, have been caught for some time in a difficult transition concerning the use and licensing of the spectrum. This band has long been home to internal systems for a wide variety of users and to small commercial wireless operators offering primarily dispatch services on a local basis. However, the industry has also seen the advent in recent years of some larger systems with the promise of regional, even nationwide

networks, employing new, more efficient technology with additional services geared more closely to mass-market offerings. With the 1993 Budget Act's requirements of new rules providing regulatory parity among comparable providers of what was designated as commercial mobile radio service (CMRS), both the FCC and the industry have engaged in a challenging and sometimes contentious attempt to craft a new licensing framework that would accommodate both established and new users of the spectrum.

Among the actions taken to facilitate the move to new rules has been a series of application "freezes" that, together, ended all new licensing on the SMR Category and General Category channels. The first of these freezes is now in its third year. The inability to expand their operations has been a major concern to commercial and private licensees alike, while low sales volume has created a disincentive for manufacturers to develop innovative equipment for the band.

Debate between traditional operators and wide-area licensees centered on the issue of retuning/relocating incumbents from the upper 200 channels of the SMR band, with small operators maintaining strong opposition to displacement of their systems by likely competitors winning channel blocks at auction. The guarantee of "comparable facilities" included in the Commission's *First Report and Order* in the docket has ameliorated concerns to some degree. However, final decisions on the precise definition of comparable facilities have yet to be made, and may not eliminate the possibility of protracted negotiations in some cases.

The pre-auction EA settlement that is the heart of the consensus proposal is intended to offer an inducement to upper-channel incumbents to retune/relocate quickly to the lower 230 channels. By providing an opportunity for relocatees and lower channel incumbents to acquire rights to their frequency(s) throughout an EA, and to determine their respective usage of the channel(s) within that area without participating in an auction, the Commission creates a powerful incentive for cooperation by both commercial and non-commercial licensees. The Parties view the licensees' resulting drive toward new opportunities as a positive shift in attitude, promising a better future for the 800 MHz band.

B. Adoption of the Consensus Position Will Bring Service More Quickly to the Public.

With incentives for licensees to determine new channel positions and settle on geographic service areas more efficiently, the public will benefit from more rapid availability of both traditional and enhanced SMR services. The Parties hope that

heavily loaded analog systems will be able to add new customers--some for the first time in many months--as soon as the migration to new channels and the EA settlement process is complete.[1] At the same time, an expedited retuning/relocation process will mean more rapid availability of enhanced services on contiguous channel blocks in the upper 200 channels of the band.

Due to the expectation that they will provide services competitive with PCS and cellular, and potentially with the wireline telephone network, some 800 MHz incumbent and geographic area licensees are now subject to additional regulatory requirements as "covered SMR providers," a category employed in various recent proceedings.[2] Those licensees will be able to comply with new requirements, as well as to offer the competitive services giving rise to those requirements, more quickly through adoption of rules that facilitate the migration process.

C. The EA Settlement Process Reduces the Administrative Burden on the Commission.

The industry consensus position promises a faster, less resource-intensive process for settling the entire 800 MHz band, with far less work for the Commission. As outlined in the *Second Further Notice of Proposed Rulemaking* (2nd FNPR) in this docket, regulatory oversight of the 800 MHz migration process promises to be burdensome, consisting of sequential auctions of the upper 200 and the lower 230 channels, with an overlapping three years of voluntary and mandatory negotiations for the upper channel incumbents and geographic-area licensees. This entire process promises to be time and resource consuming for the Commission, which, of necessity, will be involved in conducting auctions, determining incumbent positioning, overseeing mandatory negotiations and processing multiple sets of license applications.

By encouraging voluntary negotiation in the retuning/relocation process and among licensees in the lower band, the industry consensus plan ensures that the

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[1] SMR operators have informed the Parties that, in both urban and rural areas, they have stopped adding new customers to their systems due to lack of additional capacity, and in some extreme cases, have refused to allow existing customers to add new mobiles.

[2] *See, e.g., First Report and Order,* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263 (adopted June 12, 1996 and released July 12, 1996).

industry does much of this work. There is likely to be less need for oversight of mandatory retuning/relocation negotiations if many licensees move voluntarily. Notably, both coordination of incumbent positions and application for EA licenses on the lower band will be the responsibility of those occupying the channels. The auction of remaining channels also will be simpler, with much less need to identify incumbents with systems requiring protection.

The EA settlement process contemplated in the consensus position is unique, in that this spectrum will be the new home of licensees retuned/relocated from another portion of the band that will join other incumbents. The Parties do not contemplate that this process will serve as a precedent for licensing in other services.

III. ADOPTION OF THE CONSENSUS POSITION PROVIDES SIGNIFICANT OPPORTUNITIES FOR SMALL BUSINESSES.

As the Parties have discussed with the FCC on many occasions, much of the SMR industry consists of very small businesses. Indeed, the average SMR business is far smaller than the FCC's definition of "small business" adopted for any auction thus far. In a recent AMTA survey of its members in connection with the Commission's *Notice of Inquiry* into small business market entry barriers,[3] the large majority of respondents employed 15 or fewer people, and generated gross revenues of far less than $3 million per year.

Many of these small businesses have been providing wireless communications services to radio users in their communities for nearly twenty years. Their businesses have grown gradually, necessitating additional spectrum to accommodate new customers. However, much of the 800 MHz band has been "frozen" to new station applications for a full two years, making further growth impossible.

The Parties agree with the Commission that auctions provide a fast and generally efficient means of licensing new spectrum. However, the general belief among the small businesses of the SMR industry, some of which have been participants in previous FCC auctions, is that they have no chance of succeeding in gaining the spectrum they need for future growth if they must compete against larger entities with deeper pockets.

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[3] *Notice of Inquiry*, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, FCC No. 96-216 (adopted May 10, 1996 and released May 21, 1996).

By bypassing the auction process for channels where incumbent parties can agree, the Commission can provide urgently needed opportunities for these small businesses on congested channels that will include retunees/relocatees and other systems that must all be protected. In some cases, they will be able to expand their service areas to a small degree. In others, the settlement agreement with other incumbents may not provide an opportunity for real system growth. However, licensees that participate in the settlement process will then be able to identify and focus on future opportunities. In rural areas especially, the thousands of small businesses that are SMR customers thus also will benefit from the availability of new technology, and/or the alternative of continued low-cost, efficient dispatch services.

Once new licensing rules are in place, retuned/relocated licensees will work with other incumbents to partition the geography of their EA on relevant channels. They will be able to formulate business plans for the future of their systems, and to determine whether they should participate in the auction of either the upper 200 800 MHz SMR channels or the later auction of remaining lower band channels.

The Parties' proposal is the most equitable means available to clarify the future of these particular small businesses. The lower 230 channels of the 800 MHz SMR band are not only the "home" of many incumbent systems; as the Commission has decided, it is the band to which incumbents from the upper 200 channels will be retuned/relocated. Should the Commission move forward with only a geographic overlay/auction licensing framework, this will be the only spectrum housing licensees who were 1) moved from their original channels by competitors and 2) required to compete with other competitors for a geographic license that includes their new spectrum.

The consensus position also provides an opportunity for non-SMR licensees, many of which are also small businesses, to expand. Since provision of communications services is not the primary business of these operators, they are generally not in a position to compete with commercial operators at auction for what the FCC has determined to be commercial spectrum. These licensees are, therefore, greatly concerned about the future availability of spectrum for their operations. While far from providing a spectrum "reserve" in this band -- the Parties do not believe enough unused frequencies remain in any populated area to provide such a reserve -- the ability to negotiate with other licensees for a portion of a geographic area license could provide some flexibility for these licensees to meet future needs.

The Parties therefore submit that adoption of the industry consensus proposal is in the best interest of existing and future commercial licensees in this band, as well as non-commercial licensees and the general public. We urge the Bureau to recommend adoption of this plan to the Commission, and will be happy to discuss this matter further at your convenience.

Respectfully submitted,

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